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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1974

NO. 74-740

OVERTON THIERRY,
Defendant-Petitioner,

VERSUS

UNITED STATES OF AMERICA,
Plaintiff-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

The petitioner, Overton Thierry, prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Fifth Circuit, which order was rendered on October 9, 1974.

OPINIONS BELOW

The Court of Appeals for the Fifth Circuit affirmed the judgment of the Trial Court without an opinion pursuant to Local Rule 21 of the Rules of

the said Court.[1] A copy of the said Order is attached hereto and marked "Appendix A."

No written findings of fact or conclusions of law were made by the District Judge as to any point on appeal.

---

1. Local Rule 21, Fifth Circuit Rules, provides:

> When the court determines that any one or more of the following circumstances exists and is dispositive of a matter submitted to the court for decision: (1) that a judgment of the district court is based on findings of fact which are not clearly erroneous; (2) that the evidence in support of a jury verdict is not insufficient; (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole; (4) that no error of law appears; and the court also determines that an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.
>
> In such case, the court may in its discretion enter either of the following orders:
>
> "AFFIRMED. See Local Rule 21,"
> or
> "ENFORCED. See Local Rule 21."

JURISDICTION

The order of the United States Court of Appeals for the Fifth Circuit was rendered on October 9, 1974. A timely petition for rehearing and petition for rehearing en banc was denied on November 13, 1974. The said order is attached hereto and marked "Appendix B." A motion for stay of mandate pending application to this Court for review on certiorari was thereafter filed, urging that the summary treatment of one issue of appeal[2] had sanctioned an abrupt departure from the usual course of judicial proceedings, constitutionally mandated, and that it would be to perpetuate a manifest injustice to Mr. Thierry, your

---

2. The single issue presented by this petition for a writ of certiorari deals with the comments by a prosecutor in closing argument, supportive of a witness' testimony, which was like testimony but not then subject to cross-examination.

petitioner, to cause his imprisonment in the face of such egregious error without affording him the opportunity of having this Court decide the issue herein presented. The said motion was denied on November 26, 1974, and is attached hereto and marked "Appendix C."

The judgment of the District Court was a final judgment appealable to the Court below. The order of the Court below, affirming the District Court judgment without opinion, is a final order of that Court. The jurisdiction of this Court to review upon writ of certiorari the final order of the United States Court of Appeals for the Fifth Circuit, affirming the judgment of the United States District Court for the Eastern District of Louisiana, is vested by, and is invoked by petitioner under, 28 U. S. C. Sec. 1254 (1). See, also, Rule 19(1)(b) of the Rules of this Court.

QUESTION PRESENTED

Although it is felt that other reversible error existed in this case, the most egregious error occurred in the closing arguments of the prosecutor when he affirmed the testimony of a Government witness on a highly material point and thereby failed, refused or neglected to afford petitioner his right of confrontation and cross-examination, constitutionally guaranteed by the Sixth Amendment to the Constitution, and put before the jury evidence which had come from a source other than the witness stand, in violation of petitioner's right under the Fifth Amendment to the Constitution not to be convicted upon evidence so interjected into this trial. The question herein presented is:

Whether petitioner's rights were violated, and a fair trial denied, when, even though there was testimony from a Government witness, John May, that he had told the prosecuting attorney that

Nolan James' attorney, petitioner herein, was procuring alibi witnesses for Nolan James, the prosecutor affirmed and corroborated that statement of the Government witness, saying in argument,

> * * * John May told me and agents of the F. B. I. almost a full month before the trial that Nolan James had told him that his attorney was procuring alibi witnesses for him for seven thousand dollars.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fifth Amendment Due Process Clause, the Sixth Amendment Jury Trial Clause, and the Sixth Amendment Confrontation Claude of the Constitution of the United States, which provisions are set forth herein pursuant to the Rules of this Honorable Court:

FIFTH AMENDMENT DUE PROCESS CLAUSE:

> No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *.

SIXTH AMENDMENT JURY TRIAL CLAUSE:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * *; * * *.

SIXTH AMENDMENT CONFRONTATION CLAUSE:

> In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him; * * *.

STATEMENT OF THE CASE

The facts relevant to the question presented by this petition are an uncontroverted matter of record, appearing in the transcript of the trial at pages 740-741, and they, together with the background information felt necessary to illuminate the issue presented, are therefore presented in a summary fashion without citation to the record.

Mr. Thierry, your petitioner, is an attorney who was retained to represent Nolan James, Jr., in connection with a charge of armed robbery of a bank in Chackbay, Louisiana, on January 25,

1973. Henry Joshua, an acquaintance of Mr. Thierry's who sometimes performed various functions for Mr. Thierry, was an alibi witness in the trial of Nolan James, Jr., who, on May 9, 1973, gave testimony in the United States District Court for the Eastern District of Louisiana in support of Nolan James, Jr.'s alibi defense. Messrs. Thierry and Joshua were indicted, after Nolan James' trial, for conspiracy to obstruct justice, Mr. Joshua was indicted for making a false material declaration, and Mr. Thierry was indicted for obstruction of justice. John May was imprisoned, in federal custody at New Orleans, Louisiana, between January 25th and May 9th, 1973. John May testified at the trial of this case, but not at the trial of Nolan James, Jr., that about a month before the trial of Nolan James, Jr., he had informed F. B. I. agents and, pointing at Mr. Cornelius R. Heusel, Assistant United States Attorney, Mr. Heusel that

Nolan James' attorney was procuring false alibi witnesses in Nolan James' case.

Mr. May was not called as a witness in Nolan James' case, which clearly reflected adversely upon his credibility in this case. The argument against his testimony was that, if the witness had told the agents and prosecutor, as he claimed, that Nolan James' attorney was procuring false alibi witnesses, John May would have been subpoenaed on Nolan James' trial to testify as a rebuttal witness. Since that was not done, the inference existed, if in fact it is not the way it truly happened, that the said witness did not make such a revelation to Government officials until some time between Henry Joshua's testimony and the grand jury indictment of Messrs. Thierry and Joshua. Further, Nolan James' credibility was attacked on the basis that he was a dissatisfied client who turned against his lawyer after he was

convicted of the bank robbery. Following Nolan James' testimony the prosecutor stood and announced (Tr. 296-298; "Appendix E" hereto):

> MR. HEUSEL: Your Honor, there is something I would like to bring to the Court's attention for the benefit of the Defendants and the -- and the Court.
>
> In response to Counsel's opening argument and to the cross-examination, the Government intends to call a witness on direct examination, not the next witness, at least before we rest, by the name of John May, and I would like to advise the Court and Counsel at this time the reason we have not done it before is that John May's testimony, we felt, was not admissible until the defense made their strategy known and the Defendants have indicated ---
>
> THE COURT: Be seated a minute, gentlemen and we will go ahead.
>
> MR. HEUSEL: The Defendants have indicated through their opening arguments, Mr. Dymond in particular, and through cross examination, that they intend to show that Mr. James' motive for testifying is or was generated after his conviction or at least concurrent with his conviction, and

> they have, of course, attempted to impeach him as, of course, was expected.
>
> Mr. May's testimony will be along the lines, we expect to be along the lines that he was a cellmate of Nolan James, that Nolan James advised him of this conspiracy while they were in jail, that John May in fact notified the United States Attorney's Office at our request prior to the trial, sometime prior to the trial.
>
> Therefore, we would offer his testimony not for our purpose of showing the truth of what Nolan James said but to show in fact he did say it prior to the motive being in effect that the Defendants have contended.

John May was called and did testify as the prosecutor indicated he would. In closing argument, Mr. Heusel told the jury (Tr. 740-741):

> * * * John May told me and agents of the F. B. I. almost a full month before the trial that Nolan James had told him that his attorney was procuring alibi witnesses for him for seven thousand dollars.

John May had been called to support the testimony of Nolan James, Jr., and it was apparently felt by

the prosecutor that his corroboration witness himself needed corroboration. Rather than assuming the witness stand and subjecting himself to cross-examination by defense counsel, Mr. Heusel relied upon and took advantage of his opportunity to argue the case in order to directly corroborate John May's testimony and thus indirectly corroborate Nolan James, Jr.'s testimony. There is no opportunity to cross-examine the Government prosecutor in closing argument and we feel that his statement was tantamount to his testifying in support of John May's credibility. Thus, evidence extremely vital to the Government's case, was interjected through a device that certainly departs abruptly from the accepted and usual course of judicial proceedings and did not all get before the jury from the witness stand. Defense counsel instantly objected and the Court admonished the jury that Mr. Heusel's declaration could not be consi-

dered as evidence. See "Appendix F", annexed hereto.

Where, as here, a prosecutor reiterates testimony of matters personally involving himself, we felt, and we continue to feel, that such an admonition to the jury was inadequate to protect petitioner's right to a fair trial by an impartial jury acting, in determining its verdict, upon evidence received exclusively through the witnesses and exhibits. We appealed the judgment so obtained and the conviction of petitioner was affirmed without opinion.

REASONS FOR GRANTING THE WRIT

The Occurrences Here, If Sanctioned Also By This Honorable Court, Could Virtually Rob Citizens Facing Trial in Criminal Cases of the Most Fundamental Protections in the Constitution, i. e., the Right to Be Judged Only Upon Evidence Admitted Through Witnesses and Subjected to Cross-Examination.

We respectfully urge that if the procedure utilized at the trial in this case, and sanctioned

without explanation by the Court below, should prevail, then heretofore unacceptable and unusual practices will become the norm. The place to prevent such occurrences from becoming usual is now, when the voice of this Court would curtail future resort to such practices.

In Turner v. Louisiana, 379 U. S. 466, 471-472 (1965), this Court quoted a former declaration of the law which it had made in Irvin v. Dowd, 366 U. S. 717, 722 (1961). The said statement was there applied in a different context than originally made, and it is even differently applied here. But we feel, as this Court felt in Turner v. Louisiana, supra, that these principles are immutable and universally applicable. This Court quoted:

> "In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process. * * *'A fair trial in a

> fair tribunal is a basic requirement of due process." * * * In the ultimate analysis, only the jury can strip a man of his liberty or his life. In the language of Lord Coke a juror must be as 'indifferent as he stands unsworne.' * * * His verdict must be based upon the evidence developed at the trial. Cf. Thompson v. City of Louisville, 362 U. S. 199 (1960). This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies. It was so written into our law as early as 1807 by Chief Justice Marshall in 1 Burr's Trial 416 * * *." 366 U. S., at 722. (Emphasis Added.)

Following that statement of principle, this Court, in Turner v. Louisiana, supra, at 472-473, made the following statement which, we feel, controls here:

> The requirement that a jury's verdict "must be based upon the evidence developed at the trial" goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury. "The jury is an essential instrumentality -- an appendage -- of the court, the body ordained to pass upon guilt or innocence. Exercise of calm and informed judgment by its members is essential to proper enforcement of

> law." * * * Mr. Justice Holmes stated no more a truism when he observed that "Any judge who has sat with juries knows that, in spite of forms they are extremely likely to be impregnated by the environing atmosphere." * * *
>
> In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the "evidence developed" against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel. * * *

In the Turner case, the jury were put in the care of two deputy sheriffs who subsequently testified in the trial against Wayne Turner. This Court recognized, and so held, that this incident augmented or enhanced the credibility of those two witnesses in the eyes of the jury. There was some speculation that these witnesses may also have commented to the jurors about the case when they were not testifying and subjected to cross-examination. But this Court's opinion was based not on such speculation

but upon the constitutional impropriety of bolstering an official's testimony by virtue of this relationship to the jury. The Court said (379 U. S. at 473):

> * * * What happened in this case operated to subvert these basic guarantees of trial by jury [i. e., the right of confrontation, of cross-examination, and of counsel]. It is to be emphasized that the testimony of Vincent Rispone and Hulon Simmons was not confined to some uncontroverted or merely formal aspect of the case for the prosecution. On the contrary, the credibility which the jury attached to the testimony of these two key witnesses must inevitably have determined whether Wayne Turner was to be sent to his death. * * *.

In this case, the credibility attached to Nolan James' and John May's testimony was crucial to the Government's case. Their testimony was not confined to some uncontroverted or merely formal aspect of the case. It had been hotly disputed from the opening statement of defense counsel, through cross-examination of the said witnesses, at closing

arguments and at each juncture in between. If the jury disbelieved Messrs. James and May, Messrs. Thierry and Joshua would have been acquitted. The cheap shot taken by the prosecutor in this case, personally affirming the veracity of John May and so indirectly supporting the testimony of Nolan James, Jr., defied all of the fundamental principles espoused in the jurisprudence of this Court and the judgment below should not be made the prelude to recurrence of these practices until they become the usual and accepted mode of securing convictions of some citizens through the unsuspecting cooperation of others called to serve as jurors. If Your Honors permit what has happened here to go unchecked, you will soon be unable to check prosecutorial misconduct at all. The constitutional rule that evidence come from the witnesses, not the non-testimonial arguments of prosecutors, is at stake in this case. It should not be abdicated. Mr.

Thierry, the victim of such a patently unconstitutional deviation from the rule, should not be forsaken by this Honorable Court.

There are yet other reasons why this Court should consider this case. Petitioner respectfully submits that the Fifth Circuit, without written reasons therefor, turned aside from its own jurisprudence to reach the determinations it made under its Local Rule 21.

In Gradsky v. United States, 373 F. 2d 706, 710 (5 Cir. 1967), the prosecutor argued at trial to a jury that "the government representatives don't put a witness on the stand unless there appears to be some credibility, until he appears to be a truthful witness." The prosecutor further argued, "Certainly the government has every opportunity to check out and to judge the credibility and truthfulness of Mr. Zane and Mr. Gilmore in this case, and in that context, we offered you their testimony." Relying

on its own prior precedents, McMillian v. United States, 363 F. 2d 165 (5 Cir. 1966), and Dunn v. United States, 307 F. 2d 883 (5 Cir. 1962), the Court of Appeals for the Fifth Circuit reversed the judgment and remanded the cause for re-trial.

In Dunn v. United States, supra, at 885, the Fifth Circuit wrote:

> It is improper for counsel to express his personal opinion or to state facts of his own knowledge, not in evidence, and not a part of the evidence to be presented. (Emphasis Added.)

The prosecutor's supporting role for the credibility of the government witnesses never matured into a testimonial, but only was accomplished as an argumentative, presentation. While John May's testimony was in evidence, it did not have the imprimatur of verification by the government until the prosecutor argued that "John May told me * * *"! This was not merely a summarization of the testimony but the personal assurance to the jury that

John May spoke the truth. This was not subject to cross-examination and so violated petitioner's Fifth and Sixth Amendment rights. As in Gradsky, supra, at 710, the government attorney's statement represented to the jury that the government's belief in the credibility of the witness was based on something other than the evidence of record --- it was stated to them by a participant, as a representation of knowledge gained by participation in the event about which John May testified. There is no room in a fair trial for such deviation from the constitutional right to confront and cross-examine persons who make factual representations to the jury, even if it is a prosecutor who deviates from the constitutional rule.

CONCLUSION

This Court should grant this petition for a writ of certiorary and, after arguments, it should reverse the judgment below and remand this cause

to the District Court for retrial.

Respectfully submitted,

F. IRVIN DYMOND
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Commerce Building
New Orleans, Louisiana 70112
Telephone No. (504) 524-3316

CERTIFICATE

I certify that a copy of the foregoing Petition for Writ of Certiorari has been served upon the Solicitor General of the United States by United States Mail, First Class postage prepaid, by mailing three (3) copies of same to him at his official address in the office building for the Department of Justice, Washington, D.C., this 11th day of December, 1974.

F. IRVIN DYMOND
Attorney at Law

APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 74-1670

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

OVERTON THIERRY, HENRY JOSHUA, JR.
Defendants-Appellants

Appeal from the United States District Court for the Eastern District of Louisiana

(October 9, 1974)

Before TUTTLE, THORNBERRY and SIMPSON, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21. 1/

1/ See N. L. R. B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

APPENDIX "B"

United States Court of Appeals
Fifth Circuit
Office of the Clerk
Edward W. Wadsworth 600 Camp Street
Clerk New Orleans, La. 70130

November 13, 1974

TO ALL COUNSEL OF RECORD

Re: 74-1670 U. S. A. V. THIERRY AND JOSHUA

Dear Counsel:

This is to advise that an order has this day been entered denying the petition(s) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition(s) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH
CLERK

By /s/Anne G. Parent
Deputy Clerk

cc Mr. F. Irvin Dymond
Mr. Arthur L. Harris, Sr.
Mr. Cornelius R. Heusel
Ms. Mary Williams Cazalas

APPENDIX "C"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 74-1670

UNITED STATES OF AMERICA,
Plaintiff-Appellee

versus

OVERTON THIERRY, HENRY JOSHUA, JR.,
Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Louisiana

O R D E R:

IT IS ORDERED that the motion of appellant Overton Thierry filed in the above styled and numbered cause for a stay of the issuance of the mandate pending his petition for writ of certiforari in this cause be, and the same is hereby DENIED. See Fifth Circuit Local Rule 15, as amended January 11, 1972.

/s/
UNITED STATES CIRCUIT JUDGE

start promptly at 1:30.

We will recess about this time tomorrow. I think you will understand from the progress we will not finish Friday. We will continue the case on Monday, and you can make your plans accordingly.

I have every reason to believe we will finish on Monday. Sometimes we are disappointed when surprises do happen, but I know of no circumstances at this time which will change my prediction. There you must understand that's the best I can do is make a prediction.

Thank you very much, ladies and gentlemen.

We will see you tomorrow at 1:30 in the afternoon.

The jury may leave the Courtroom.

(Whereupon, the jury leaves the Courtroom after which time the following proceedings were had outside their presence:)

APPENDIX "E"

THE COURT: Thank you, Mr. James, you can step down.

THE WITNESS: Yes, sir.

THE COURT: Gentlemen, is there anything for the record before we recess?

MR. HEUSEL: Your Honor, there is something I would like to bring to the Court's attention for the

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benefit of the Defendants and the -- and the Court.

In response to Counsel's opening argument and to the cross examination, the Government intends to call a witness on direct examination, not the next witness, at least before we rest, by the name of John May, and I would like to advise the Court and Counsel at this time the reason we have not done it before is that John May's testimony, we felt, was not admissible until the defense made their strategy known and the Defendants have indicated --

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APPENDIX "E"

THE COURT: Be seated a minute, gentlemen and we will go ahead.

MR. HEUSEL: The defendants have indicated through their opening arguments, Mr. Dymond in particular, and through cross examination, that they intend to show that Mr. James' motive for testifying is or was generated after his conviction or at least concurrent with his conviction, and they have, of course, attempted to impeach him as, of course, was expected.

Mr. May's testimony will be along the lines, we expect to be along the lines that he was a cellmate of Nolan James, that Nolan James advised him of this conspiracy while they were in jail, that John May in fact notified the United States Attorney's Office at

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our request prior to the trial, sometime prior to the trial.

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Therefore, we would offer his testimony not for the purpose of showing the truth of what Nolan James said but to show in fact he did say it prior to the motive being in effect that the Defendants have contended.

Now, I have previously furnished Your Honor with some six or seven cases, the Government's authority for doing -- for calling this witness.

As I said, I will provide Counsel with Jencks Act material at this time prior to leaving tonight, but I wanted to advise both Counsel and the Court that the Government intends to call awitness for the purpose of giving, in effect, hearsay testimony, but hearsay we believe is admissible under the cases that I have cited to the Court.

THE COURT: Furnish opposing Counsel, I have these cases before me, furnish opposing counsel with the citations, and the rest of you gentlemen

may see these materials which were handed me in your presence this morning. I have not glanced at them or looked at them.

I will give the Defendants a chance to respond after they have looked at the Jenck Act

Motive to make them, but John May told me and agents of the F. B. I. almost a full month before the trial that Nolan James had told him that his attorney was procuring alibi witnesses for him for some seven thousand dollars.

MR. DYMOND:

Your Honor, I object to this if this is a statement by Mr. Heusel as to a transaction that he claims that he participated in.

THE COURT:

Ladies and gentlemen, you must disregard anything that the U. S. Attorney says about anything that he has participated in in this regard and just regard only the evidence as you have heard it from the witness stand.

The U. S. Attorney, of course, is not a witness and is not under oath, and you should disregard everything he sayd in this argu-

ment, as I told you at the outset, because what he says in the argument is not testimony at all, it's an attempt to persuade you.

All right, you may proceed.

MR. HEUSEL:

Ladies and gentlemen, John May testified that he told the F. B. I. and me, he pointed at me and he said,